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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TUOLOMNE

RESTORE HETCH HETCHY, a non-profit, public benefit corporation ,

Petitioner and Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO PUBLIC UTILITIES COMMISSION, a municipal agency; and DOES I – X, inclusive,

Respondents and Defendants.

MODESTO IRRIGATION DISTRICT, a public agency; TURLOCK IRRIGATION DISTRICT, a public agency; BAY AREA WATER SUPPLY AND CONSERVATION AGENCY, a public agency; and ROES I–X, inclusive,

Real Parties in Interest and Defendants.

Case No. CV 59426

PLAINTIFF'S OPPOSITION TO DEFENDANTS' DEMURRER TO VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF

Hearing Date: 1/29/2016
Hearing Judge: Hon. Kevin M. Seibert
Time: 8:30AM
Place: Dept. 4

Date Action Filed: 4/21/2015
Trial Date: Not set

MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

Plaintiff Restore Hetch Hetchy seeks a declaratory injunction and a writ of mandate declaring Defendants City and County of San Francisco and San Francisco Public Utilities Commission's[1] reservoir drowning the Hetch Hetchy Valley in Yosemite National Park an unreasonable method of diversion under Article X, section 2 of the California Constitution. San Francisco, and theBay Area Water Supply and Conservation Agency (collectively "Defendants") have filed a demurrer to Petitioner Restore Hetch Hetchy's Verified Petition for Writ of Mandate and Complaint for Declaratory Relief on three grounds. Defendants contend that: (1) federal law preempts application of Article X, Sec. 2 of the California Constitution; (2) Petitioner's case is time-barred by Code of Civil Procedure ("CCP") § 338's three-year statute of limitations; and (3) Petitioner has failed to state facts sufficient to constitute a cause of action under Article X, Sec. 2. Modesto and Turlock Irrigation District's have joined in Defendants' memorandum. Defendants' Demurrer has no merit and should be overruled on all three grounds.

First, preemption is unwarranted in the present circumstances. By its design, the Raker Act subjects San Francisco's right-of-way to California law with respect to "control, appropriation, use or distribution of water." Defendants' Request for Judicial Notice ("RJN"), Ex. A ["Raker Act"] §11. Congress inserted this savings clause to make clear that compliance with California water law should operate as a condition precedent to exercise of the grant of right. As the author of the Raker Act, Congressman John Raker firmly stated in his arguments supporting the bill, "[t]he bill is not drafted nor designed nor intended to usurp the powers of the State of California in the matter of control of the distribution of water." (63 Cong. Rec. 3900) (Aug. 29, 1913) (remarks of Rep. Raker) (Plaintiff's Request for Judicial Notice ("RHH RJN"), Ex. A.) Conflict preemption would only be appropriate if the relief sought directly conflicted with a congressional mandate included in the Raker Act. However, as underscored by Congressman Raker, there is no conflict between the relief requested by Restore Hetch Hetchy and any congressional directive in the Raker Act that would override the application of the Act's savings clause. The relief requested is only a declaratory judgment as to the reasonableness of the City's method of diverting water from the Tuolumne River and does not ask the Court to require the removal of O'Shaughnessy Dam. Furthermore, the Raker Act does not include a directive to build or maintain the O'Shaughnessy Dam and the Hetch Hetchy Reservoir, but only grants a permissive grant of right, which

[1] Plaintiff shall collectively refer to the City and County of San Francisco and its Public Utilities Commission as "San Francisco," "CCSF," or "City."

the City can choose to abandon. Without a directive requiring operation of the dam, there is no conflict even if California law does require that the dam no longer be allowed to flood the Hetch Hetchy Valley.

Second, Defendants' statute of limitations argument is without merit. CCP § 338 only applies to statutes. The present claim, however, is brought under a provision of the California Constitution. In addition, Defendants fail to consider the nature of Article X, Sec. 2, which establishes an evolving standard of what constitutes a reasonable beneficial use of water. Applying a static statute of limitations to Article X, Sec. 2's evolving reasonableness standard would conflict with the Constitutional provision. Finally, San Francisco's violation of Article X, Sec. 2 is continuing and is not barred by any statute of limitations, or alternatively, is recurring and each violation triggers a new limitations period.

Third, the Petition and Complaint unquestionably state a claim for which relief may be granted. Specifically, Plaintiff seeks to enforce the self-executing provision of Article X, Sec. 2 requiring that any method of diverting water in the state be reasonable. Contrary to the City's arguments, Restore Hetch Hetchy does not question the reasonableness of the City's use of its Tuolumne River water rights. Nor does the Complaint seek to reduce or otherwise question the City's rights to Tuolumne River water – it only questions the method of diversion. In arguing that Plaintiff has failed to state a claim, CCSF misstates Article X, Sec.2's requirements and mischaracterizes Plaintiff's basis for its claim as a challenge to the reasonable of the City's use, rather than its method of diversion. Plaintiff's Complaint alleges numerous facts and circumstances surrounding San Francisco's Hetch Hetchy Valley diversion that, taken together, amount to an unreasonable method of diversion and warrant the requested relief.

For these reasons, Restore Hetch Hetchy respectfully requests that the demurrer be overruled.

BACKGROUND

Hetch Hetchy Valley is located in the northwest portion of Yosemite National Park. Prior to flooding, the Tuolumne River flowed through the valley past extensive wetlands, meadows and robust stands of trees. (Complaint ¶ 19.) CCSF first sought to secure a right-of-way to construct a dam and reservoir in the Valley in 1903. (*Id.* at ¶ 23). From 1903 through early 1913, one Secretary of the Interior after another refused to grant the right-of-way, ultimately deferring the issue to Congress. (*Id*.)

On December 19, 1913, the House of Representatives passed the Raker Act, which conditionally granted San Francisco the right to construct a number of dams, powerhouses, pipelines and related facilities in the Tuolumne River watershed in order to make use of their water rights in the area. (H.R. 7207; Public Act No. 41.) Due to concerns over the State's rights, the Act includes a savings clause making the grant subject to California's water law. Section 11 of the Act provides:

> That this act is a grant upon certain express conditions specifically set forth herein, and *nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used* in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with the laws of said State.

(Raker Act, § 11 (1913) (emphasis added).) San Francisco accepted the grant, and the O'Shaughnessy Dam was completed in 1923. (Complaint ¶ 26.) The Raker Act also allowed for the construction of additional dams and reservoirs in Yosemite and the neighboring Stanislaus National Forest, including Lake Lloyd (also known as Cherry Reservoir) and Lake Eleanor, as well as various pipelines, tunnels, powerhouses and other infrastructure. The reasonableness of these components of San Francisco's water system is not questioned by the present action, as Plaintiff only challenges the reasonableness of the Hetch Hetchy Reservoir.

In 1928, California enacted Article X, Sec. 2 of the California Constitution. This provision requires that the manner and location of diverting water out of streams and rivers must always be reasonable. Article X, Sec. 2 provides, in relevant part, that:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use ***or unreasonable method of diversion of water***.

(Cal. Const., Art. X § 2 (emphasis added).)

Regardless of whether at the time of enactment of the Raker Act, the City's dam and reservoir in Hetch Hetchy Valley represented a reasonable method for diverting water from the Tuolumne River, it certainly is not reasonable now. Viewed with current sensibilities in mind and the ever-growing popularity of the Nation's national and state park systems, any such decision today would be unimaginable and patently unreasonable, especially where San Francisco may access its undisputed Tuolumne River water rights through other means of diversion. Restore Hetch Hetchy brought this action on April 21, 2015 alleging that CCSF's operation of the O'Shaughnessy Dam and Hetch Hetchy Reservoir violates California water law, as it constitutes an unreasonable method of diversion under Article X, Sec. 2. Petition, ¶ 1. The Petition prays for a declaratory judgment to that effect and a peremptory writ of mandate ordering San Francisco to prepare a written plan detailing alternative reasonable methods of diversion of the City's Tuolumne River water rights. *Id.* at 21:10-16. San Francisco's motion to change venue was denied on October 23, 2015. On December 21, 2015, Defendants filed the present demurrer.

LEGAL STANDARD

A demurrer tests the legal sufficiency of a petition and whether it adequately states facts necessary to constitute a legally recognized cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d 311.) A demurrer "will not be sustained if the pleadings, liberally construed, state a cause of action on any theory." (*Parker v. Board of Trustees* (1966) 242 Cal.App.2d 614, 617; *Maxwell v. City of Santa Rosa* (1959) 53 Cal.2d 274, 279; *Lloyd v. Cal. Pictures Corp.* (1955) 136 Cal.App.2d 638, 642, 643 ("It is well established that a general demurrer must be overruled if, on any theory, it states a cause of action").) "All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief." (*Lloyd v. Cal. Pictures Corp.* (1955) 136 Cal.App.2d 638, 642.) When assessing the sufficiency of the allegations, the court assumes the truth of the alleged facts. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230.) Upon review of the petition for writ of mandate and its necessary elements, courts afford the petition a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.) Even where the court sustains a defendant's demurrer, if there is a reasonable possibility that the defective petition can be cured, the court allows for amendments. (*Lloyd*, 136 Cal.App.2d at 643.)

ARGUMENT

I. THE DEMURRER SHOULD BE OVERRULED BECAUSE PREEMPTION IS NOT WARRANTED WHERE THERE IS NO CONFLICT BETWEEN THE RAKER ACT AND THE RELIEF SOUGHT.

In assessing a challenge under the federal Constitution's Supremacy Clause, Art. VI, cl. 2, the court must determine "whether Congress intended to prohibit the states from regulating in such a manner." (*Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 659 F.2d 903, 919 (9th Cir. 1981), *rehearing denied* (1982), *aff'd* 461 U.S. 190 (1983).) Courts start this assessment with a presumption "that the states' police powers were not to be superseded 'unless that was the clear and manifest purpose of Congress.'" (*Id.* (*citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Quesada v. Herb Thyme Farms* (2015) 62 Cal.4th 298, 312-15.) Congressional intent to preempt state law can be explicitly stated by Congress, (*Bronco Wine Co. v. Jolly* (2005) 33 Cal.4th 943, 955), or it may be inferred from the nature of the regulatory scheme, but "Congressional intent to preempt must . . . be unambiguous." (*Pac. Legal Found.*, 659 F.2d at 919.) "[P]reemption can be implied where "compliance with both federal and state regulations is an impossibility," or where the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Bronco Wine*, 33 Cal.4th at 955.) This type of preemption is known is "conflict preemption."

"The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption." (*Id.* at 956.) When considering a conflict preemption claim, the court "may not seek out conflicts between state and federal regulation where none clearly exists." (*United States v. Cal. State Water Res. Control Bd.*, 694 F.2d 1171, 1176 (9th Cir. 1982) (citing *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 45, (1966).)) Moreover, the presumption still "operates in favor of the validity of the state law." (*Pacific Legal*, 659 F.2d at 919.) Conflict preemption only acts to invalidate state law "to the extent that it actually conflicts with federal law." (*Id.*)

A. In Enacting the Raker Act, Congress Stated a Clear and Manifest Intent to Subject San Francisco's Grant to California Water Law.

Defendants would have the Court believe that the implementation of Article X, Sec. 2 would contradict the purpose of the Raker Act and the congressional directives it establishes. However, the Raker Act's plain text and its legislative history make clear that Congress not only explicitly protected California's authority over water law, but also that compliance with California law should operate as a condition precedent to exercising the grant of right.

1. The plain text of the Raker Act unambiguously provides that San Francisco's right-of-way is subject to California water law.

To interpret the Raker Act, the Court must first look to the "plain language" of the statute, which is the "one, cardinal cannon before all others." (*Connecticut Nat'l Bank v. Germain* (1992) 503 U.S. 249.) A review of federal legislation pertaining to water resources reveals a "consistent thread of purposeful and continued deference to state water law by Congress." (*California v. United States*, 438 U.S. 645, 653 (1978).) There is a "well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water." (*Id*. (citing 35 Cong. Rec. 6678 (1902). *Pacific Legal Foundation*, 659 F.2d at 919; *Bronco Wine Co.*, 33 Cal.4th at 956.) The Raker Act is no exception. After concerns were raised that the Act might be interpreted to impede state water law, Congress included a savings clause explicitly making the grant of right subject to California law with respect to "control, appropriation, use or distribution of water" in and from the Tuolumne River without exception or limitation. (Raker Act, § 11 (1913); 63 Cong. Rec. 3967 (1913) (remarks of Rep. French).) Indeed, Congress even extended those laws to the Secretary of the Interior, mandating that the Secretary "in carrying out the provisions of this act, shall proceed in conformity with the laws of said State." (Raker Act, §11.)

The California Constitution's prohibition on unreasonable methods of diversion of water under Article X, Sec. 2 is a "law[] of the State of California relating to the control, appropriation, use, or

distribution of water key. Section 11 of the Raker Act makes the Act subservient to that critical state law.

2. The legislative history of the Raker Act further demonstrates congressional intent to preserve California's jurisdiction with respect to state water law.

Congressional intent not to interfere with California water law in granting the right-of-way through Hetch Hetchy Valley was consistently emphasized throughout the floor debates on the Act. Rep. Raker, the namesake and sponsor of the bill, stated, "[t]he bill is not drafted nor designed nor intended to usurp the powers of the State of California in the matter of control of the distribution of water." (63 Cong. Rec. 3900 (Aug. 20, 1913).) He later added, "there is no attempt by Congress to control the waters which belong to the State…." (*Id.* at 3905.) This intent not to interfere with California water law was echoed throughout the floor debates by numerous Congressmen.[2]

The legislative history speaks directly to Congress' intent that the grant of right was intended to be subject to California's water law regulating methods of diversion. Rep. Kent stated, that the inclusion of the savings clause "simply means as a ***condition precedent*** to this grant the Federal Government wants to see the laws of California are obeyed." (*Id.* at 3917.) Rep. French also referred to compliance with state water law as "condition precedent" to exercise of the right. (*Id.* at 3967 (Aug. 30, 1913).) Most on point, Sen. Works explicitly stated that California would have the right to "determine that San Francisco ***should get her water somewhere else***" even after the right-of-way was granted. (63 Cong. Rec. 185 (Dec. 4, 1913) (emphasis added).) These statements directly contradict Defendants' arguments that implementation California water law would frustrate congressional intent to the extent that it may interfere with the operation of the dam.[3]

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[2] *See e.g.* 63 Cong. Rec. 3964 (Aug. 30, 1913) (statement of Rep. French) ("It is specifically set forth that nothing in the act shall interfere with the rights enjoyed by the citizens of the State under the laws of California"); 63 Cong. Record 4096 (Sep. 2, 1913) (statement of Rep. Ferris) ("I am sure about that as far as that is concerned. This bill leaves the regulation with the State"); 63 Cong. Rec. 185 (Dec. 4, 1913) (statement of Sen. Clark) ("[A]ll I want to do is conform to the laws of California in the use of this water."); 63 Cong. Rec. 3967(1913) (statement of Rep. French) (the savings clause includes language "that could not be said to have the appearance even of adjusting water rights" and "requires that administration of the act, so far as it has to do with the water that may be used, shall proceed in conformity with the laws of that State of California.")

[3] In fact, the legislative history demonstrates that, at the time, it was the wide-spread belief that Congress lacked the authority to adjust water rights, which were the sole jurisdiction of the state. It was "conceded by everyone that the water and water rights belong to the State." 63 Cong. Rec. 4096 (Sep. 2, 1913)

In addition, this legislative history does not support Defendants' contention that the Section 11 Savings Clause arose solely out of concerns regarding the grant's potential impacts on the irrigation districts' water rights. (Defendants City and County of San Francisco et al.'s Memorandum of Points and Authorities in Support of Defendants' Demurrer to Petitioner's Verified Petition for Writ of Mandate and Complaint for Declaratory Relief ("Defendants Memo.") at p. 5.) Those distinct concerns are directly addressed by Section 9(b) through (f) of the Raker Act, which require San Francisco to recognize the District's prior rights and set forth specific flows to be released for their benefit. The broad language and accompanying legislative intent for Section 11 demonstrates it goes well beyond the Districts' interests – interests already fully addressed in Section 9.

The legislative history establishes that Congress intended the grant of right to operate subject to California law and leaves no room for Defendants' to meet their burden to demonstrate a manifest intent to preempt State water law.

B. A Declaratory Judgment under Article X, Sec. 2 of the California Constitution Does Not Interfere with Congressional Directives under the Raker Act.

Conflict preemption is a very stringent standard, imposing a heavy burden of proof on the party claiming preemption. Emphasizing "the long history of 'purposeful and continued deference to state water law by Congress," courts assessing federal preemption of state water law have only allowed for conflict preemption under a narrow set of circumstances. (*Cal. State Water Res. Control Bd.*, 694 F.2d at 1176 (internal quotations omitted).) In considering preemption, courts must begin with the presumption in favor of validity of state law. (*Pacific Legal*, 659 F.2d at 919.) When analyzing the preemptive effect of statutes with savings clauses, the Supreme Court has held that state law governs to the extent "that is not inconsistent with clear congressional directives respecting the project." (*California v. United States*, 438 U.S. at 647.) Moreover, preemption of state law only invalidates the law to the extent its implementation actually conflicts with federal law. (*Bronco Wine*, supra, 33 Cal.4th at 955; *Pacific Legal*, 659 F.2d at 919.)

(statement of Rep. Raker); 63 Cong. Rec. 59 (Dec. 12, 1913) (statement of Sen. Works) ("I do not think it will be seriously contended – it has not been so far—that the National Government has any right to interfere with the distribution of water. That is a right that belongs exclusively to the States"); *Id*. at 3968 (statement of Rep. French) ("I believe, of most, if not all, of the members of the committee that the Congress cannot adjudicate water rights within the States"). If Congress was not even operating under the impression that it *could* adjust water rights, it is patently unreasonable to interpret the Act to express a manifest intent to supersede those rights.

As explained above, the text of the Raker Act and relevant legislative history do not support San Francisco's contention that the Raker Act intended to preempt any aspect of California water law. However, even if such intent did exist, seeking a declaration as to whether the current operation of O'Shaughnessy Dam and its reservoir violates Article X, Sec. 2's reasonable method of diversion requirement does not conflict with "clear congressional directives" of the Raker Act. First, the Raker Act only provides a permissive right and includes no mandatory congressional directive to build and operate the O'Shaughnessy Dam and the Hetch Hetchy Reservoir in perpetuity. Second, conflict preemption must be determined based on the relief sought. Plaintiff only seeks a declaratory judgment that the diversion is in violation of Article X, Sec. 2. Third, unlike case law under the Reclamation Act and Federal Power Act, this action only attempts to subject a local government to state law. Finally, there is no conflict where the grant is no longer necessary to meet San Francisco's water supply needs. Therefore, there is no conflict between applying California water law and congressional directives in the Act.

1. ***There is no conflict with congressional directive because the Raker Act only created a permissive grant of right, not a mandate of use.***

Furthermore, no conflict is created by enforcing Art. X, Sec. 2 because the Raker Act does not include *any* directives from Congress that would directly conflict with the present action. Throughout their memorandum, Defendants state that Congress, in enacting the Raker Act, "directed" San Francisco to build the Hetch Hetchy Reservoir. (Defendants Memo., p. 2:20-21; 3-12; 9:12-14.) This characterization of the Raker Act is patently incorrect. A "directive" by its very nature requires action. Merriam Webster Dictionary defines directive as "an official order or instruction" or "something that serves to direct, guide, and usually impel toward an action or goal." However, the Raker Act does not order or instruct the construction of O'Shaughnessy Dam and the Hetch Hetchy Reservoir. Instead, it created a permissive grant of a right-of-way, which San Francisco, as the grantee, could choose to accept or not: "We are making a grant of rights in the public lands to the city of San Francisco. . . and San Francisco can take the grant with all those conditions or it can let it alone." (*United States v. San Francisco*, 310 U.S. 16, 29 n.21 (1940) (citing 51 Cong. Rec., Part 1, p. 69).) Under the text of the Act, the City had six months after the approval of the Act to accept. (Raker Act, §9(s).) Only after the City accepted was it subject to the conditions that accompanied the grant that San Francisco details in its memorandum.

Even if Defendants were correct in asserting that the law established a directive to the City to construct the O'Shaughnessy Dam, Plaintiff does not challenge the reasonableness of the construction of

the dam. In fact, Article X, Sec. 2 was enacted five years after the dam was completed. Plaintiff's only contention is that the flooding of what John Muir called "one of nature's rarest and most precious mountain temples" is no longer reasonable in the present day, given current feasibility of alternatives and the number of beneficial uses that it displaces. (Complaint, ¶ 20.) This contention does not, as Defendants suggest, aim to "update acts of Congress in light of changing social values." (Defendants Memo., p.12 (citing *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-33).) Instead, Plaintiff intends to follow the directive of Congress in requiring that San Francisco utilize its right-of-way pursuant to California law, which itself does take into account changing social values.

Thus, the issue for the court must be not whether the Raker Act directed the construction of O'Shaughnessy Dam and the Hetch Hetchy Reservoir, but whether the Act mandates its continued existence and use in perpetuity. The answer to this question is plainly no. The Raker Act does not contain any provision relating to the length of time for which O'Shaughnessy Dam and its reservoir should be operated. To the contrary, the legislative record makes apparent that Congress envisioned that California could, at a later date, substantially alter the City's water diversion. It bears repeating that Sen. Works stated that California has the right to "determine that San Francisco should get her water somewhere else" even after the right-of-way was granted. (63 Cong. Rec. 185 (Dec. 4, 1913).)

Defendants' arguments to support a permanency requirement are simply insufficient to override the express intent to preserve California's right to govern water rights, including methods of diversion, within the state. Their first argument is that Congress chose to pass the Act in lieu of requiring the City to obtain a license because a permanent grant would give San Francisco the necessary security to justify the large expenditures needed for constructing the dam. Second, Defendants note that one congressman referred to reservoirs and dams as "structures not of a temporary character." (*See* Demurrer at p.4 (citing 63 Cong. Rep. 3964-5).) However, the grant of a permanent right, regardless of purpose, does not create a directive for permanent operation where the right can be abandoned at will. Moreover, that dams are generally not of a 'temporary character' does not imply that they do not have a lifespan. Built in 1923, O'Shaughnessy Dam is already 93 years old.

Defendants are also mistaken in their contention that the numerous conditions to which the grant is subject support a finding of conflict preemption. (Defendants Memo., p.9-10 (citing Raker Act §§ 7, 9)). Plaintiff concedes that once San Francisco accepted the grant, it became subject to certain conditions in the construction of the dam, such as "diligent prosecution of the work" for three

consecutive years. (*Id.* at § 5.) However, that a grant of right is accompanied by conditions, does not subject the grantee to any requirement to continue to exercise that right in perpetuity. Moreover, the consequence of failure to comply with the conditions are not forced compliance, but forfeiture of rights. (*Id.* at §§5, 9.) That the right can be lost at any time for failure to adhere to conditions undermines Defendants' arguments that congressional intent was for the dam and reservoir to be permanent. If congressional intent was to ensure a permanent grant, it would not have made the right so easily lost.

Most importantly, Defendants' argument of this implicit permanency requirement is undermined by Congress' decision to explicitly subject those conditions to the laws of the State of California in Section 11. In arguing that the grant was permanent, Defendants quote Rep. French's explanation of the financial need for security in such a large expenditure. (Defendants Memo. at p. 10.) However, the City's quotation and excerpts included in its Request for Judicial Notice conveniently omits the remainder of Rep. French's remarks. In that same statement, Rep. French went on to emphasize that the water law of California is absolutely paramount and would not be affected by the bill in any way:

> I have been opposed to the principles of Government attempting to adjudicate ***in any way*** water rights within the several States or to exercise control over water that, in my judgment, is under the control of several States.
> Upon a hasty reading of the pending bill there are some who may say that we are violating this very principle, and yet upon closer consideration and especially upon consideration of section 11 of the bill . . . I believe that one can not feel that such is the case. On the contrary, in that final section, it is set forth that ***nothing contained in the act shall be construed to affect or in any way, to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in . . . any [use] . . ."***

(Cong. Record 3967 (Aug. 30, 1913) (emphasis added).) As a result, Section 11 does not cut off the fluid mandate of Article X, Sec. 2. Today the diversion of water at Hetch Hetchy is no longer reasonable, and therefore, contravenes the California Constitution. That the grant has the potential to be permanent is not sufficient to establish a clear and manifest congressional directive that the dam and reservoir exist in perpetuity. Without any such congressional directive in the Act, San Francisco's claim of perpetual right is not a basis for a finding of conflict preemption.

2. The relief sought does not conflict with the Raker Act's grant of right.

In deciding whether federal law overrides state law, courts consider whether a conflict arises based on the nature of the relief sought. (*See e.g. Cal. ex rel. State Air Res. Bd. v. Dep't of Navy*, 431 F. Supp. 1271, 1289 (N.D. Cal. 1977) ("there seems to be no such conflict . . . between the purposes . . . of Sec. 233 and the relief sought by Plaintiff in this lawsuit. Thus, the Court now holds that Sec. 233

does not preempt this litigation."); *Pub. Util. Dist. No 1 v. IDACORP Inc.*, 379 F.3d 641, 650 (9th Cir. 2004) (finding conflict preemption applied where plaintiff asked the court to set a price invoking a state rule that would "interfere with the method by which the federal statute was designed.").) When considering whether state law is preempted courts "may not seek out conflicts between state and federal regulation where none clearly exists." (*Cal. State Water Res. Control Bd.*, 694 F.2d at 1176.) Defendants argue that Article X, Sec. 2 conflicts with the Raker Act to the extent that it requires the removal of the Hetch Hetchy Reservoir. (Defendants Memo., p.6.) However, even if requiring removal would conflict with the Raker Act (which Plaintiff contends it does not), Plaintiff does not ask the court to require the City to take down the dam. Plaintiff only seeks declaratory relief that the dam is unreasonable under Article X, Sec. 2. *See, e.g. Williams v. San Francisco* (1942) 56 Cal.App.2d 374, 381 (where "portion of the judgment upon which this contention is based is merely declaratory … It is evident, therefore, that for the present at least the defendant is in no way affected by that portion of the judgment"). Once declaratory relief is granted in this case, it will then be up to San Francisco, at least initially, to exercise its discretion as to how to address the issue of reasonableness to come into compliance with California law.

San Francisco cites *California v. United States* as supporting its argument that a conflict exists (Defendants Memo., p.14, n. 6), but relegates to a footnote the subsequent case history that demonstrates the extent to which courts will try to reconcile two provisions. In *California v. United States*, the Supreme Court addressed the California State Water Resources Control Board's ("SWRCB") authority over the construction of the New Melones Dam, which was authorized by Congress under the Reclamation Act. (438 U.S. 645, 647 (1978).) The Court found that the inclusion of a savings clause[4] almost identical to that of the Raker Act "makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." (*California*, 438 U.S. at 675.) Therefore, the

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[4] The Reclamation Act savings clause provides:

> [Nothing] in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws…

The Reclamation Act, 32 Stat. 390, codified 43 U.S.C § 383 (1902).

Court held that absent *direct conflict with congressional directive*, state law must be complied with in the "control, appropriation, use, or distribution of water." (*Id*.)

The Supreme Court remanded the case to the Ninth Circuit to determine whether the conditions imposed by the SWRCB on the New Melones Dam were actually inconsistent with the Reclamation Act. (*Id* at 674.) On remand, the Ninth Circuit upheld each and every condition. (*Cal. State Water Res. Control Bd.*, 694 F.2d. at 1177-81.) Where it was possible to reconcile the provision with congressional intent, the Court stressed that the principles embodied in the Reclamation Act required it to do so. (*Id.* at 1178 ("We will not impute extreme positions to a state in an attempt to decide what is in essence a premature question.")) The Court held that if the interpretation of certain provisions actually led to direct contravention of congressional directives, only then could the Court step in and limit the exercise of state law. (*Id*.) Under this reasoning, even where a provision could be interpreted by the SWRCB in such a way that conflicted with the Reclamation Act, the Court would refrain from finding a conflict until the SWRCB adopted that interpretation. In the present action, the relief sought is merely a declaratory judgment as to reasonableness and a preemptory writ of mandate to prepare a plan. Defendants do not argue that a finding of unreasonableness or a plan would conflict with any congressional intent manifested in the Raker Act. Defendants only argue that the Raker Act conflicts with an interpretation requiring removal of the O'Shaughnessy Dam. There is no request the Court order removal of the dam, and thus any conflict preemption on that basis cannot hold. Nor would that eventuality conflict with either the terms of the Raker Act, especially Section 11, or the clear intent stated by the Act's author and others that ""[t]he bill is not drafted nor designed nor intended to usurp the powers of the State of California in the matter of control of the distribution of water." (63 Cong. Rec. 3900) (Aug. 29, 1913) (remarks of Rep. Raker) (emphasis added) (RHH RJN, Ex. A.) In any event, *Cal. State Water Res. Control Bd.*, 694 F.2d 1171, makes clear the Court should not look down the road and consider whether a conflict *may* arise in response to a finding of unreasonableness, but must stay within the scope of the relief sought.

3. Key differences between the Raker Act, Reclamation Act, and Federal Power Act demonstrate that conflict preemption is not warranted in the present action.

In support of its conflict preemption argument, Defendants rely on a number of cases arising out of the Reclamation Act and the Federal Power Act ("FPA"). Both federal statutes, as previously discussed, contain savings clauses similar to that found in the Raker Act. But the facts of the cited cases are readily distinguished from the Raker Act and the grant to San Francisco. The Reclamation Act was a "massive" federal program to construct and operate dams, reservoirs, and canals across seventeen U.S.

states. (*California v. United States*, 436 U.S. at 646.) By capitalizing on the "prime value" of Western agricultural lands to the national economy, the Reclamation Act was intended to expend Federal resources for the greater public good. (*Id.* at 649.) As characterized by the Supreme Court, "If the term 'cooperative federalism' had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it." (*Id.* at 650.)

Similarly, the FPA was enacted to develop a "complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach . . ." (*First Iowa Hydro-Elec. Coop. v. Fed. Power Com.*, 328 U.S. 152, 180 (1946).) The Act created the Federal Power Commission ("FPC") (now Federal Energy Regulatory Commission) to regulate and coordinate national hydroelectric activities.

These two Acts both involve circumstances where the federal government perceived a common problem by expending its own resources and designating a federal agency to manage the project. In this situation, it follows that the federal government would be concerned about state laws that impede implementation of these federal programs. In *Cal. State Water Res. Control Bd.*, the Court framed the issue very explicitly:

> In the case before us, therefore, a state limitation or condition on the federal management or control of a ***federally financed water project*** is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme.

(*Cal. State Water Res. Control Bd.*, 694 F.2d at 1177.)

In *First Iowa Hydro-Electric Cooperative*, Iowa maintained that the FPA's savings clause required a proposed hydroelectric dam on Cedar River to demonstrate compliance with state permitting requirements before it could be granted a license by the FPC. (328 U.S. at 161-62.)[5] The Supreme Court found that requiring the petitioner to obtain a state permit as a condition precedent to a federal license under the FPA would give the state "a veto power over the federal project." (*Id.* at 164.) The Court

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[5] Sec. 27 of the Federal Power Act states:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way interfere with the laws of respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or vested right acquired therein.

41 Stat. 1077, codified 16 U.S.C. §821.

found that Iowa's permitting process would have been "an obstacle to the accomplishment of the full purposes and objectives of Congress in authorizing the Federal Energy Regulatory Commission to license the project to proceed." (*See Sayles Hydro Ass'n v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993).) Since the federal government had taken control of the program, it was the explicit and manifest purpose of Congress to preempt traditional state powers to the extent necessary to ensure the successful operation of the project.

The O'Shaughnessy Dam and its reservoir, however, were constructed under much different circumstances that utterly fail to justify preemption of traditional state powers. First, O'Shaughnessy Dam and the other components of the Hetch Hetchy water system were not intended to address a national problem, but instead concerned a *local* issue faced by San Francisco. The purpose of the Act was none other than to address the need for water by San Francisco. (*See* 63 Cong. Rec. 58 (Dec. 2, 1913).) Without an issue of common concern, Congress did not need to create a comprehensive regulatory scheme like that of the FPA or the Reclamation Act. Because the Raker Act was intended to serve a local need, the federal government lacks the same level of interest in the implementation of the project as it did in the case of reclamation or federal power supply.

Second, the Raker Act does not create a *federal* project or regulatory scheme. (*Cf. Sayles Hydro*, 985 F.2d at 455 ("the only authority states get over ***federal*** power projects relates to allocating proprietary rights in water.")) Instead, Congress created a grant of right, and attached certain conditions should the City choose to exercise the right established under the statute. There simply is not the same concern of state "veto" power as there was in the FPA. (*See First Iowa Hydro-Electric Cooperative*, 328 U.S. at 164.) In direct contrast to the FPA, the Raker Act explicitly gave San Francisco the ultimate decision to develop the O'Shaughnessy Dam, as it allowed the City six months to accept the right and the accompanying conditions.

Compare this to, for example, the authorization statute of the New Melones Dam, which directed the dam to be constructed and operated "pursuant to the Federal reclamation laws." (Flood Control Acts of 1944 and 1962, 58 stat. 901, 76 stat. 1191.) Such statutes include no conditional language or requirements that any state or local entity file "acceptance." Instead, they lay out the obligations of *federal* actors for the dam's completion and provide that "upon completion of construction of the dam" . . . it "shall become an integral part of the Central Valley project," a *federally* controlled program. (Flood Control Act of 1962, Sec. 203, Pub. L. 87-874, 76 Stat. 1173.)

Nor does the Raker Act put a Federal agency in charge of regulating the operation of O'Shaughnessy Dam, as the operation of this one dam does not create any of the "piece-meal" concerns the FPA was intended to overcome. This distinction cannot be overemphasized— the issue addressed in the Reclamation Act and FPA case law concerned state law's capacity to control and restrict the authority of a Federal agency. The Raker Act, on the other hand, involves a grant of right to a local government.[6] In the present action, there simply is no Federal agency whose authority is at issue. Defendants attempt to invoke federal preemption principles not to limit state authority over federal actors, but to limit state authority over a local government, which by its very nature only has authority to the extent it was granted by the state. (*See* Cal Const, Art. XI § 7.)

Every Reclamation Act and FPA case cited by Defendants presents the same circumstances: they involve federal projects or federal regulatory schemes implemented by federal agencies and a state's perceived attempt to somehow constrain federal action. (*See Ivanhoe Irrigation Dist v. McCraken* (1958) 357 U.S. 275; *City of Fresno v. California* (1963) 372 U.S. 627; *Environmental Defense Fund Inc. v. East Bay Mun. Util. Dist.* (1980) 26 Cal.3d 183 ("*East Bay M.U.D")*.) While *East Bay M.U.D.* also involves Article X, Sec. 2, that case pertained to the Auburn Dam, which was to be constructed by the Bureau of Reclamation and operated pursuant to the Reclamation Act. The Supreme Court of California found that the provision was preempted where the plaintiff attempted "to use state law to determine a matter within the authority of a federal agency." (*East Bay M.U.D* (1980) 26 Cal.3d at 334.) By contrast, this action does not attempt to supersede authority of a federal agency, as there is no federal agency involved in this decision-making process. It simply requires that a local government act in compliance with state law, just as the Raker Act requires of it.

Defendants' memorandum does not cite a single case where a state was prevented from determining how a local government may implement a project authorized under Federal law. Nor is the City likely to find an analogous case, because it would be plainly inconsistent with the "anti-commandeering" doctrine under the Tenth Amendment to the U.S. Constitution. "The Tenth Amendment is a shield against the federal government's using state and local governments to enact and

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[6] The only Federal actor involved in the Raker Act is the Secretary of the Interior, who simply approves the specifics of the grant and ensures the City abides with the conditions of the grant. And, the statute specifically subjects the Secretary to state law in its undertaking of these responsibilities. (Raker Act, § 11.)

administer federal programs." (*City of N.Y. v. Beretta U.S.A. Corp.*, 524 F.3d 384, 388 (2d Cir. 2008). *See New York v. United State*s (1992) 505 U.S. 144, 161-63.)) To require San Francisco to continue to operate the Hetch Hetchy Reservoir would be tantamount to commandeering the legislative process of the States by requiring the ongoing operation of a reservoir by local officials notwithstanding contrary state law. (*See N.Y. v. U.S.* 505 U.S. at 161-63.) While the City did accept the grant and the accompanying conditions, it did not agree to exercise the grant in perpetuity. For the foregoing reasons, the case law under the Reclamation Act and FPA does not support application of conflict preemption in the present circumstances.

Finally, case law under the FPA demonstrates that preemption is inappropriate where it would contradict the explicit text of a savings provision. As in the Raker Act, the effect of the FPA savings clause "in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature." (*First Iowa Hydro-Electric Cooperative*, 328 U.S. at 175-76.) In *First Iowa Hydro-Electric Cooperative*, the Court found that savings clause did not allow Iowa to impose permit requirements as conditions precedent to federal permitting, because the permit at issue related to use of water but not proprietary rights. (*Id.* at 176; *see also, California v. FERC*, 495 U.S. 490, 501 (1990) ("*First Iowa* involved a state permit requirement that related to the control of water for particular uses but that did not relate to or establish proprietary rights.")) This holding suggests that if the water right at issue were proprietary, the savings clause would have operated.

Section 11 of the Raker Act is also limited to laws pertaining "to the control, appropriation, use or distribution of water." Raker Act, §11. However, unlike *First Iowa*, the present action does involve proprietary rights. "To constitute an appropriation . . . there must co-exist 'the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use.'" (*Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) (quoting *McDonald & Blackburn v. Bear River and Auburn Water and Mining Co.*, 13 Cal. 220, 232-233 (1859).) "The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use." (*Id.*) "Other means of appropriation include . . . storage of water in a reservoir." (*Fullerton v. State Water Res. Control Bd.* (1979) 90 Cal.App.3d 590, 598 (citing *Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424)). San Francisco's diversion of water from the Tuolumne River and storage of that water in the Hetch Hetchy Reservoir undoubtedly is an appropriation. (*See Fullerton*, 90 Cal.App.3d at 598 ("The concept of an

appropriative water right is a real property interest incidental and appurtenant to land").) Therefore, the water rights at issue are proprietary and the savings clause must operate.

Defendants point to the 1917 decision of *City and County of San Francisco v. Yosemite Power Co.* (1917) 46 Pub. Lands Dec. 89, 95-96 (1917 WL 1353) (RJN, Ex. I) by then-Secretary of Interior Franklin L. Lane (previously the City Attorney for San Francisco) (*see* Complaint, ¶ 24) for the proposition that Section 11 of the Raker Act is of "limited scope." (Defendants Memo., p. 17; CCSF RJN, Exhibit I.) Secretary Lane did not opine about the scope of Section 11. Rather, he applied existing precedent to make the unremarkable determination that even a vested state water right did not, in turn, require the Secretary to grant an application for a right-of-way over federal lands. (CCSF RJN, Ex. I, pp. 95-96.) The Secretary maintained his/her full discretion to deny such an application. (*Id*., p. 96).

Restore Hetch Hetchy agrees that Congress could condition San Francisco's grant of a federal right-of-way howsoever Congress saw fit. Indeed, Congress saw fit to make San Francisco's grant conditioned on San Francisco and the Secretary fully complying with California's water rights laws. The right-of-way authorized under the Raker Act did not pertain to Yosemite Power Co. Thus, in *Yosemite Power Co*., Secretary Lane does not say anything about the level of deference due California water law mandated by Section 11 as suggested by San Francisco. (Defendants Memo., p. 18.) Section 11, read in conjunction with the Raker Act's conditional authorization and accompanying legislative history, makes clear that complete deference is due those water laws when implementing the Raker Act. The Secretary's short-hand reference to "the plan of development by San Francisco contemplated and required under the act of 1913" does not interpret the reach of Section 11 nor displace the Act's language and Congress' expressed intentions. Because the Secretary's denial of Yosemite Power Co.'s application for a right-of-way did not address any water rights and certainly did not address whether San Francisco's diversion of Tuolumne River water at the O'Shaughnessy Dam was reasonable circa 2016, no deference is due *Yosemite Power Co.* by this Court on the issues alleged by Restore Hetch Hetchy.

4. There is no conflict where the grant is no longer "necessary" to meet San Francisco's water supply needs

Finally, conflict preemption is unwarranted because Article X, Sec. 2 does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The core purpose for the passage of the Act was San Francisco's need for a reliable source of water. (*Sierra Club v. FERC* (9th Cir. 1985) 754 F.2d 1506, 1510 ("The Raker Act was passed to provide needed water for San Francisco. . .").) The Preamble extends the grant to San Francisco "as may be determined

by the Secretary of the Interior to be *actually necessary* for surface or underground reservoirs, diverting and storage dams . . .” (The Raker Act, Preamble (emphasis added).) In addition, the city’s right to divert is expressly limited to that which is “*necessary* for its beneficial use for domestic and other municipal purposes.” (*Id.* at § 9(h) (emphasis added).)

The Congressional Record also reflects this purpose of the Act. Throughout the legislative debates, the bill was promoted as necessary to meet San Francisco’s water supply issues. (*E.g.* 63 Cong Rec. H. 3894, 3898 (Aug. 29,1913).) Rep. French stated, “The idea…that should control in the consideration of this measure is the necessity of the city of San Francisco to acquire an additional water supply.” (63 Cong Rec. H. 3964 (Aug. 30,1913).) Hetch Hetchy was purported to be the only “practicable” option for the city at that time. (*E.g. id.* at 3899, 3901.) Where perceived necessity drove Congress to approve the grant, it does not contravene the Act’s purpose to abandon use of a component of the grant once the diversion location is no longer necessary. Indeed, Congress was aware that in the future other economic means of obtaining water for the city would arise. (*Id.* at 3967.) In showing that O’Shaughnessy Dam and its reservoir are no longer necessary to meet the City’s water supply needs, Plaintiff will also obviate any conflict preemption claims.

II. THE DEMURRER SHOULD BE OVERRULED BECAUSE THE CASE IS NOT TIME BARRED

A. Restore Hetch Hetchy’s Claim Pursuant to Article X, Sec. 2 is Not Barred by Any Statute of Limitations.

San Francisco argues that Restore Hetch Hetchy’s claim is time barred because CCP § 338(a)’s three-year statute of limitations started running even before Article X, Sec. 2 of the Constitution was enacted. (Defendants Memo., p. 19.) San Francisco further claims that any violation of Article X, Sec. 2 had to be brought within 3-years of the enactment of that Constitutional provision in 1928. (*Id*.) Neither of these theories has merit.

1. Section 338 applies to liability created by statute, not the California Constitution.

Section 338 only applies to a claim “upon a liability ***created by statute***.” (CCP § 338(a) (emphasis added).) Section 338(a) does not establish any statute of limitations for claims enforcing a constitutional provision. “[A] statute … is not a constitutional amendment.” (*California School Bds. Assn. v. Brown* (2011) 192 Cal.App.4th 1507, 1525 n. 21; *see* Cal. Const., art. XVIII.) This action enforces Article X, Sec. 2, a constitutional provision. “Courts have held that “liability created by statute” means “the liability is embodied in a ***statutory provision*** and was of a type which did not exist at

common law." (*Lehman v. Superior Court* (2006) 145 Cal.App.4th 109, 118 (emphasis added).) Hence, San Francisco's reliance on CCP § 338(a) is misplaced.

2. Applying a statute of limitations to Article X, Sec. 2 would truncate and displace that provision's continuing mandate that a method of diversion of water be reasonable.

Applying a three-year statute of limitation would be inconsistent with the mandate of Article X, Sec. 2. Article X, Sec. 2's mandate that methods of diversion be reasonable does not establish a static standard that is based on a single point in time many years in the past. Instead, Article X, Sec. 2 establishes an evolving standard. "What constitutes reasonable water use is dependent upon not only the entire circumstances presented but ***varies as the current situation changes***." (*E. Bay M. U. D.*, 26 Cal.3d at 194 (emphasis added) (case involved an unreasonable method of diversion based on its location).) "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal. 2d 489, 567. *See also People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal. App. 3d 743, 750.)

Applying a static statute of limitations to Article X, Sec. 2's continually evolving reasonableness standard would conflict with the Constitutional provision. "[I]t is well established that [a] statute cannot trump the Constitution." (*City of San Diego v. Sha*piro (2014) 228 Cal.App.4th 756, 788.) Courts "will not interpret a statute to suspend the operation of the Constitution sub silentio." (*California School Bds. Assn.*, 192 Cal.App.4th at 1525 n. 21.) A generic statute of limitations cannot operate to stifle the Court's authority to enforce a use or – in this case – method of diversion that has become unreasonable under the California Constitution "at a later time."

San Francisco ignores the general rule it cites that "[t]he statute of limitations to be applied in a particular case is determined by the nature of the right sued upon or the principal purpose of the action, not by the form of the action or the relief requested." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207.) The nature of the right sued upon here is whether, at the present time, San Francisco's method of diverting its Tuolumne River water rights within Yosemite National Park and the Hetch Hetchy Valley is reasonable based on modern day circumstances and current evidence comparing the benefits of a reservoir-free Hetch Hetchy Valley to the costs of altering the dam and its operation and removal of the reservoir. San Francisco ignores the inherently ongoing nature of Article X, Sec. 2's reasonableness mandate.

Even if this case were not enforcing a constitutional provision, because the nature of the case is to protect an ongoing public interest and seeks to enforce provisions protecting the public trust doctrine, the courts will not interpret a statute of limitations to prevent the adjudication of such claims. In *California Trout v. State Water Res. Control Bd.* (1989) 207 Cal.App.3d 585, the Court of Appeal addressed an action brought by a citizens' group to enforce Fish & Game Code § 5946, a provision protecting fish and the public trust. As the Court explained:

> "[Notwithstanding] the positive and comprehensive language of [Code of Civil Procedure] sections 343 and 363, if taken literally, there can be no doubt that they cannot apply to all special proceedings of a civil nature. . . . from the very nature of [certain] proceedings it is obvious that [they could not] be subject to such limitation." (*Estate of Hume* (1918) 179 Cal. 338, 342-343...) The proceeding here is of such a nature that it is outside the ambit of the generic statutes of limitation which the Water Board proffers.

(207 Cal.App.3d at 628.) Hence, because section 5946 "pertains to a public trust interest[,] no private right in derogation of that rule can be founded upon the running of a statute of limitations…." (*Id.* at 629.)[7] "One may not oust the state from [a public trust] interest by operation of a statute of limitations." *Id.* at 630. "The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights.'" (*Id.* at p. 734.) The same rule should apply to Article X, Sec. 2 which, like Fish & Game Code § 5946, pertains to the public trust and represents a critical public right that should not be denied simply because the State has not independently, as yet, sought to enforce the reasonableness standard applicable to San Francisco's method of diversion.

In addition, the State Water Resources Control Board – the agency to which Restore Hetch Hetchy will request the Court refer this matter (*see* Water Code § 2000) – would not be limited by any statute of limitations to consider the reasonableness of the O'Shaughnessy Dam and Hetch Hetchy Reservoir in Yosemite National Park. (*See California Trout*, 207 Cal.App.3d at 630.) Restore Hetch Hetchy seeks relief that is wholly forward looking. (*See id.* at 631.) These same circumstances warranted the rejection of a statute of limitations defense in *California Trout v. State Water Res. Control Board.*

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[7] The private rights at issue in *Trout Unlimited* were held by a municipal entity – the Los Angeles Department of Water and Power.

3. San Francisco's violation of Article X, Sec. 2 is continuing and not barred by any statute of limitations.

San Francisco's violation of Article X, Sec. 2 is continuing. Assuming that CCP § 338 or some other statute of limitation could be read to apply to an unreasonable method of diversion claim, the continuing violation doctrine is an equitable modification of the usual rules governing limitations periods:

> The continuing violation doctrine serves a number of equitable purposes. Some injuries are the product of a series of small harms, any one of which may not be actionable on its own.… Those injured in such a fashion should not be handicapped by the inability to identify with certainty when harm has occurred or has risen to a level sufficient to warrant action.

(*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197-98.) "[F]rom a court-efficiency perspective, it is unwise to impose a limitations regime that would require parties to run to court in response to every slight, without first attempting to resolve matters through extrajudicial means, out of fear that delay would result in a time-barred action." (*Id*.)

The equity of this doctrine as applied to Restore Hetch Hetchy's constitutional claim is apparent. The reasonableness standard is, by definition a fact-specific, case-by-case determination that is intended to evolve over time. Given the importance of San Francisco's municipal uses and the interests involved, Restore Hetch Hetchy and the public in general should not be penalized for taking the time to fully investigate and identify the unreasonableness of San Francisco's Hetch Hetchy Reservoir diversion method or for pursuing its interests through political mechanisms.[8]

Trout Unlimited v. SWRCB, supra, belies San Francisco's claim that the continuing violation doctrine is limited to nuisance claims. (Defendants Memo., p. 20.) The Court's reasoning applies equally here:

> The situation is similar to that which arises when a nuisance has been maintained for a protracted period of time. If the nuisance is the sort of ongoing conduct that can be

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[8] Restore Hetch Hetchy's local San Francisco ballot initiative did not seek to enforce Article X, sec. 2. The fact that the residents of the city reaping the drinking water and electric power benefits of destroying a extraordinary, glacier-carved valley within a national park rejected an initiative seeking to study the relocation of San Francisco's water diversion at O'Shaughnessy Dam did not consider or resolve whether that diversion is unreasonable under Article X, sec. 2. And the fact that Restore Hetch Hetchy has had to shoulder the burden of investigating the unreasonableness of the City's diversion – rather than the City conducting a study to make sure it's continued operation of the dam and reservoir is reasonable under the California Constitution – cannot hamper the group's ability to enforce the constitutional mandate.

> discontinued by an order to stop acts or omissions it is viewed as "continuing" and hence "abatable," despite the fact that the acts or omissions have been conducted for a period beyond that of the pertinent statute of limitations. [citations omitted.] The same principle has been applied to other ongoing wrongs, e.g., failure to pay child support [] and improper exercise of a franchise.

(207 Cal.App.3d at 210-11 (citations omitted).)[9] It is obvious that San Francisco daily diverts water at the O'Shaughnessy Dam and reservoir. Restore Hetch Hetchy alleges that diversion is by an unreasonable method. Assuming all facts in favor of the Plaintiff, it is apparent that the alleged violation of Article X, Sec. 2 continues every day that the diversion continues unabated.

4. Alternatively, San Francisco's recurring violations of Article X, Sec. 2 each trigger a new limitations period.

Again assuming that CCP § 338 or some other statute of limitation could be read to apply to an unreasonable method of diversion claim, Restore Hetch Hetchy's claim is timely based on the doctrine of continuous accrual. San Francisco fails to recognize this common application of statutes of limitations, instead focusing on an inaccurate statement of the continuing violation doctrine – a totally separate doctrine. (Defendants Memo., p. 20; *See, e.g. Aryeh*, 55 Cal.4th at 1197.)

"Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: 'When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.'" (*Aryeh*, 55 Cal.4th at 1199 (citing *Hogar Dulce Hogar v. Community Development Commission* (2003) 110 Cal.App.4th 1288, 1295.)) "Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation—each may be treated as an independently actionable wrong with its own time limit for recovery." (*Aryeh*, 55 Cal. 4th at 1199 (citation omitted).) As the Supreme Court explained in *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal. 4th 809:

> That plaintiffs could have brought an action for declaratory judgment at the time of the Ordinance's enactment, before the City began actually collecting its tax, does not imply

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[9] Nor are the damages at issue here permanent, as would be required by a nuisance analysis. *See* Defendants Memo., p. 20. To be permanent, the damages must not be "dependent upon any subsequent use of the property but are complete when the nuisance comes into existence." (*Baker v. Burbank-Glendale- Pasadena Airport Authority* (1985) 39 Cal.3d 862, 869.) A claim enforcing the reasonableness of a method of diversion based on current circumstances, by definition, cannot involve damages complete at the time the dam was constructed. Because Restore Hetch Hetchy is not bringing either a trespass or negligence claim, whether or not the dam and reservoir would be deemed permanent or temporary is immaterial.

> such an action was untimely because brought later, at a time when the City had collected the tax for some years and was continuing to do so. So long as an action for refund or injunction could have been brought during the period of continued collection, so could an action for declaratory relief.

25 Cal.4th at 821. Similarly, each day San Francisco diverts the waters of the Tuolumne River at O'Shaughnessy Dam is an unreasonable diversion method. Thus, each day, another violation of Article X, Sec. 2 accrues, well within any statute of limitations that arguably could apply.

III. THE DEMURRER SHOULD BE OVERRULED BECAUSE PLAINTIFF STATES A CLAIM UNDER ARTICLE X, SEC. 2 OF THE CALIFORNIA CONSTITUTION UPON WHICH RELIEF CAN BE GRANTED.

Restore Hetch Hetchy states a claim for relief to enforce the self-executing provision of Article X, Sec. 2 requiring that any method of diverting water in the state be reasonable. San Francisco's method of diversion flooding the Hetch Hetchy Valley is unquestionably subject to the limitations of Article X, Sec. 2. The California Supreme Court has long held that "[t]he limitations and prohibitions of [Article X, Sec. 2] now apply to every water right and every method of diversion." (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367-368.) The Court clarified that this provision establishes that:

> Such [water] right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water….Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution. The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed. The problem is to apply these rules in the varying circumstances of cases as they arise.

(*Id.*; *See also, Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 443 ("All uses of water, including public trust uses, must now conform to the standard of reasonable use.")

Moreover, Plaintiff has the right to bring an action asking the Court to enforce this provision. "Private parties … may seek court aid in the first instance to prevent unreasonable water use or unreasonable method of diversion. (*E. Bay Mun. Util. Dist.*, 26 Cal.3d at 200.) "So long as there is an "actual controversy," the trial court has the power to enter a judgment declaring the rights of the parties…" (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 288 (citing CPC § 1060).) "What is a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case." (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 139, superseded by statute on other grounds *City of Emeryville v. Superior Court* (1991) 2 Cal.App.4th 21, 24.)

A. Because San Francisco's Argument that the Complaint Fails to State a Claim is Based on Fictitious Allegations Not Found in the Complaint, the Court Should Summarily Reject This Argument.

Despite this explicit right of action, San Francisco argues that Restore Hetch Hetchy fails to state a claim. The City quotes a few phrases in the Complaint in isolation and, from that, redrafts the Complaint's allegations in order to distance them from the requirements of Article X, Sec. 2. Ultimately, the City rephrases a few select terms to state, "[a]ccording to Petitioner, water rights holders violate the Constitution if they could conceivably change their method of diversion - and undertake myriad other changes to their water systems, all at great expense - to further a greater number of different types of uses." (Defendants Memo., pp. 21. *See id*., p. 25.) No such allegation appears in the Complaint. The Complaint does not allege, as San Francisco suggests, that any "conceivable" changes to water diversions are required whenever additional beneficial uses would be achieved. San Francisco's effort to implicitly amend Restore Hetch Hetchy's complaint and effectively excise almost all of its allegations is contrary to the rule on demurrer that the Court assume all of the Plaintiff's allegations are true. (*See Lee v. Hanley,* 61 Cal.4th at 1230.) By expending extensive space in its memorandum rebutting an allegation that does not exist, San Francisco does not establish any infirmity in Restore Hetch Hetchy's claim. (Defendants Memo., pp. 25-27.)

Taken in context, what the Complaint does allege are numerous facts and circumstances surrounding San Francisco's Hetch Hetchy Valley diversion that, taken together, amount to an unreasonable method of diversion. (Complaint, ¶¶ 2-3, 19-20, 27-30, 34-41, 55.) The fact that a number of important beneficial uses are lost due to the existing method of diversion and would be restored to use if the diversion were relocated is but one of many facts contributing to the unreasonableness of drowning the Hetch Hetchy Valley. (*See* Complaint, ¶ 55.)

San Francisco attempts to find fault with two factual allegations in the Complaint and then erroneously contends that Restore Hetch Hetchy's unreasonable method of diversion claim hinges entirely on those allegations. (Defendants Memo., p. 21.) San Francisco cites to Paragraphs 45 and 48, claiming they allege in part "that every method of diversion must further 'the greatest number of beneficial uses' or 'as many relevant uses as may be reasonable.'" (Defendants Br,. p. 21.) But Paragraph 45 actually alleges in relevant part:

> This Constitutional provision requires that, wherever reasonable, the conservation and use of waters implement as many relevant beneficial uses as may be feasible. "When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield." *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368."

(Complaint, ¶ 45.) A few paragraphs later, the Complaint summarizes this notion, alleging that "[t]he requirement that all diversion methods be reasonable and seek to further the greatest number of beneficial uses is not static." (*Id.*, ¶ 48.) Even considered in isolation, there is nothing inconsistent between those statements and the text of Article X, Sec. 2 as well as the Supreme Court's ruling in *Peabody v. City of Vallejo*. Indeed, the pertinent sentence of Article X, Sec. 2 says pointedly:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use ***to the fullest extent of which they are capable***.

(Article X, sec. 2 (emphasis added).) San Francisco simply ignores this critical provision of Article X, Sec. 2. (Defendants Memo., p. 26.) Given the ruling in *Peabody v. City of Vallejo* "that there be the greatest number of beneficial uses which the supply can yield," and the declaration of Article X, Sec. 2, there is nothing inconsistent with Restore Hetch Hetchy's allegations in Paragraphs 45 and 48.

B. The City's Argument That Its Use of Tuolumne River is Beneficial Does Not Obviate Restore Hetch Hetchy's Claim That the City's Method of Diverting That Water is Unreasonable.

San Francisco spends the remainder of its failure to state a claim argument focusing again on a claim that is not alleged by Restore Hetch Hetchy, *i.e.*, that the City is engaged in the unreasonable use of water. (Defendants Memo., pp.25-27.) What the Complaint does allege, and what is ignored by San Francisco, is that the City's method of diverting Tuolumne River water is unreasonable. (Complaint, 1-2, ¶ ¶ 1-2, 6, 50, 55.).) Indeed, Restore Hetch Hetchy's requested relief is limited to a declaration that "Respondent's operation of the O'Shaughnessy Dam and flooding of the Hetch Hetchy Valley is an unreasonable method of diversion pursuant to Article X, Sec. 2 of the California Constitution" and also requesting the preparation of a plan "detailing alternative reasonable methods of diversion of Defendants' Tuolumne River water rights that do not rely upon the continued presence of the Hetch Hetchy Reservoir." (*Id.*, p. 21.) The Complaint does not seek to reduce or otherwise question the City's rights to Tuolumne River water – it only questions the method of diversion. Indeed, San Francisco's effort to confuse the allegations of the Complaint is made despite the Complaint clearly stating that the City's municipal use of water from the Tuolumne River is a beneficial use. (Complaint, ¶ 2.) Whether or not San Francisco's right to use Tuolumne River water for municipal purposes is the highest use is of no moment because this action does not seek any declaratory relief challenging the City's exercise of its water rights.

San Francisco's claim that its use of Tuolumne River water takes priority over any other beneficial uses that would otherwise be realized in Hetchy Hetchy Valley is incorrect. In this day and

age, the municipal use of water does not trump instream and other beneficial uses. San Francisco cites Water Code Section 106, which states that "the use of water for domestic purposes is the highest use of water." (Defendants Memo., p. 23.) However, San Francisco fails to acknowledge the Supreme Court's ruling that "these policy declarations [including Section 106] must be read in conjunction with later enactments requiring consideration of in-stream uses (Wat. Code, §§ 1243, 1257…) and judicial decisions explaining the policy embodied in the public trust doctrine. Thus, neither domestic and municipal uses nor in-stream uses can claim an absolute priority." (*Nat'l Audubon Soc'y*, 33 Cal.3d at 448 n. 30.) Thus, contrary to San Francisco's suggestion, the reasonableness of a method of diversion cannot be determined by simply identifying that the water is used for domestic purposes. (*See* Defendants Memo., p. 23.) Moreover, Restore Hetch Hetchy's claim does not seek to alter in any way the amount of Tuolumne River water to which San Francisco is entitled. The requested relief is clear that any plan by the City to bring its diversion into line with Article X, Sec. 2 need not reduce or alter the amount of water to which San Francisco is entitled.

The fact remains that Article X, Sec. 2 requires a case-by-case analysis to determine what constitutes a reasonable method of diversion. San Francisco attempts to re-craft an unduly-limited version of Article X's reasonableness standard, claiming it only requires (1) that the diversion be reasonably efficient and (2) the diverter put the water to beneficial use. (Defendants Memo., p. 24.) This argument relies on five cases, none of which actually truncates the case-by-case determination of reasonableness called for by Article X, Sec. 2. In *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 934-35, the court briefly addressed Article X's prohibition on waste, not a method of diversion. In that instant, the court rejected a claim that Pasadena wasted water by failing to capture stormwater and waters used to flush streets, fight fires, and flow sewage and return those waters to an underground basin. No method of diversion was challenged as unreasonable in that action. Nor does that ruling articulate San Francisco's suggested reasonableness criteria.

In *Trussell v. City of San Diego* (1959) 172 Cal.App.2d 593, 611, the court rejected defendant City of San Diego's argument that the plaintiffs' seasonal diversion dam was an unreasonable method because it was temporary and occasionally washed out and thus precluded injunctive relief against the City's operation of an upstream dam. Rather than the crabbed reasonably efficient and beneficial use criteria claimed by San Francisco, the Court in *Trussell* approved the trial court's review of (1) the likely cost of improving the temporary dam; (2) the fact that water released ended up in behind another City of San Diego Dam downstream; and (3) the absence by plaintiffs of any unnecessary consumptive use of

the water. (*Id*. at 610-11.) If anything, *Trussell* underscores the site-specific nature of a determination of the reasonableness of a diversion method. None of the carefully addressed facts considered in *Trussell* supports San Francisco proposition that the Court would only consider the diversion's efficiency and the beneficial uses made of the water.

In *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, in the context of determining whether a diversion was continuous, the Court did determine that a ditch that lost five-sixths of the water during transmission was not a reasonable method of diversion. (*Id*. at 585.). However, the court did not suggest that the unique facts of that particular ditch set the standard for reasonableness of all methods of diversion in California. (*Id*.)

Lastly, in *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, the court determined that a large number of downstream water rights holders who, in many cases, lost about 40 to 45 percent of their water in their diversion ditches was not an unreasonable method of diversion. (*Id*. at 572-73.) The court's ruling was informed by evidence of local custom as well as the context in which the issue arose: as part of the upstream defendant's claim that the court should require the downstream water rights holders (the plaintiffs) to line their ditches so the defendant could divert more water. (*Id*. at 573.) By addressing the particular facts and circumstances of the diversion ditches, *Tulare Irrigation* did not announce the rule claimed by San Francisco that reasonable efficiency and a beneficial use are all a court reviews to determine a diversion method's reasonableness.

The City's effort to reduce Article X, Sec. 2 to the City's two self-serving criteria – reasonable efficiency and putting the water to beneficial use – also fails to acknowledge the long-standing case law that putting water to beneficial use does not address the reasonableness of that use or, as here, the reasonableness of the method of diverting the water. (*See Forni*, 54 Cal.App.3d at 751 ("the claim that Defendants' use of water is beneficial does not bring it within the constitutional postulate of reasonableness"); *Joslin*, 67 Cal.2d at 143 ("the mere fact that a use may be beneficial … is not sufficient if the use is not also reasonable within the meaning of section 3 of article XIV . . .").)

San Francisco continues to distort Restore Hetch Hetchy's claim beyond recognition by arguing that "it would be preposterous to require every water rights holder in California to employ methods of diversion that also serve as many other beneficial uses as theoretically possible." (Defendants Memo., p. 27.) Again, the Complaint's allegations are focused on the unreasonableness of maintaining a reservoir in the Hetch Hetchy Valley of Yosemite National Park. The Complaint does not allege a standard based on "theoretical possibilities." Nor does Restore Hetch Hetchy claim any unreasonable diversions outside

of Yosemite National Park or even outside of the grand Hetch Hetchy Valley. There is no potential scenario that the robust, site-specific facts alleged by Restore Hetch Hetchy would be applicable anywhere else in the State. Because the City's claim of absurd results relies on careless misstatements of Restore Hetch Hetchy's allegations, the City's arguments do not detract from the robustness of the Complaint's actual allegations or the legitimacy of Restore Hetch Hetchy's claim under Article X, Sec. 2.

CONCLUSION

For all the foregoing reasons, Restore Hetch Hetchy respectfully requests that the Demurrer to Plaintiff's Complaint be overruled.

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